Office - Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS
CLERK

NO. 82-173

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;
MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

PETITIONER'S REPLY TO BRIEF OF THE SECRETARY OF COMMERCE

While the Secretary of Commerce (Secretary) seems to agree that the petitioner, Washington State Charterboat Association (Association), should have been granted intervention in the case below, he concludes that "the case presents no issue of sufficient importance to warrant a grant of certiorari" and that "petitioner's assertion (Pet. 39) that it has been aggrieved by denial of access to the courts must still be seen as hyperbole." Not only does this conclusion denigrate the importance of the issues of this case to the Association and the citizenry of Washington and the United States as a whole, but it is based on totally misleading and/or incorrect assertions of fact and law.

A. The United States Provides No Support For The Lower Courts' Decisions.

The only facts referenced by the Secretary to support his suggestion that the right of the Association to intervene may be an "unclear issue" relate to the participation of the State of Washington in the case. The Secretary suggests that somehow the need to admit the Association may have been eliminated since the State of Washington had a quite similar perspective to the Association and since this Court has held that fishermen's associations could be bound by orders in proceedings where they were absent but where the State was a party.

The Secretary never states why participation by the State as a party in any way affects the admitted requirements set forth by this Court in the case of Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972). To the contrary, the participation of the State in no way qualifies as adequate protection of the Association's interests

under the three-pronged test of Trbovich set forth at p.36 of Petitioner's opening brief: the State was not a party when the Association sought intervention; the pleadings in the case set forth differences between the positions of the Association and the State; the State was not capable of making all the same arguments since its intervention was only granted on reconsideration the day of trial and was severely limited by the court[1]; the State was statutorily required to represent the interests of all the user groups of the State, including the Indians, many of which are inconsistent with the best interests of the Association; and the State has so far chosen not to appeal the district court's decision. In addition, many cases have noted the impossibility of the government to adequately protect the private interests of business and the public

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[1]Due to these factors, the State did not present any testimony or file any brief on the merits. Furthermore, most of the arguments which would have been offered by the Association were not made.

interest in the same action. See, e.g., National Farm Lines v. ICC, 564 F.2d 381, 383 (10th Cir. 1977); New York Public Interest Research Group v. Regents of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975).

The fact that the Association could possibly be bound by an order of the district court in a proceeding to which it was not a party (Secretary's brief, note 6) is totally irrelevant to the question presented by this appeal. Nor do the rights dealt with in this case relate to rights to harvest fish in State waters, but rather the harvest of fish in the federally regulated fishery conservation zone established by the Fisheries Conservation and Management Act (FCMA). As such, the rationale of the cases cited by the Secretary regarding the ability of the State to represent the interests of its fishermen are totally inapposite to this case.

B. The Position Of The United States Regarding Justification Of Review By This Court Is Based On Incorrect And/Or Misleading Assertions.

The United States' suggestion

that the Association exaggerates when it states that it has been aggrieved by denial of access to the courts is apparently based on its mistaken or misleading assertions that the Association now has a case on the merits before the court of appeals, that the district court did not in 1981 or 1982 order reductions in the ocean fishery, and that the district court has recently held that treaties do not compel the result which the petitioner feared. Not only are these rationales incorrect and improperly applied to this case, but they totally ignore the very severe impact the case below continues to have on the Association, on other non-Indian fisheries off the coast of Washington, and on the social fabric of Washington coastal communities, as well as the obligations of the United States under the FCMA and treaty right law.

The regulatory format which has been adopted by the Secretary, largely in order to implement his view of the treaty

obligations, has decreased the number of ocean sports angler trips from greater than 500,000 in the pre-regulatory time frame to only 234,700 in 1981 and less in 1982. This not only has reduced the charterboat fleet and ocean recreational fishery by more than 50%, but has been devastating to the economic and social fabric of the coastal communities involved. It has made a mockery of the legislative direction to the Secretary to preserve and enhance the recreational fisheries regulated under the FCMA.

At page 8 of its brief, the United States suggests that any impact of these regulations on the ocean recreational fishery should not be of concern to this Court with respect to this case since the district court did not, in 1981 or 1982, order reductions in the ocean fishery. This suggestion totally misrepresents the effects of the case below and its dramatic impacts on the ocean fishery. While it is true that, in 1981, the district court did not order a reduction in the ocean fishery, it did order

a dramatic reduction in escapement levels on the coastal streams in order to provide the tribes at least 50% of each run. This will have a very dramatic impact on the Association since those reduced escapement levels equate to a reduced abundance of the resource when it matures three years later. The reason the court did not order a reduction in the ocean fishery for 1982 was that the Secretary adopted regulations which were already designed to meet the court's mandate in the case below, and which provided by far the lowest quota and shortest season for non-Indian ocean salmon harvest in history. There was thus no need for the court to reduce the ocean fishery to implement its previous decision.[2]

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[2]The very real harm to the Association's position does not rely on court-ordered reductions in the ocean fishery in any event. The Secretary was, prior to the decision by the district court, regulating the ocean in a fashion which guaranteed the tribes a greater than 50% overall harvest of the salmon resource. It is the Association's contention that this is contrary to both the FCMA and the treaty right which has been interpreted by this

The United States also suggests that, since the Association's own case on the merits is now before the court of appeals, the need for review by this Court is eliminated. This suggestion totally ignores the continuing jurisdiction being exercised by the district court and the dramatic impact such continuing jurisdiction has had, and will continue to have, on the Association's economic viability.[3] It also ignores the

Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Whether or not 1981 or 1982 involved substantial reductions in the ocean fishery, that fishery was already greatly reduced by the improper regulatory framework adopted by the Secretary prior to the case.

[3]This continuing jurisdiction presents a need for intervention by the Association which is totally independent of any appeal in its own case. The district court has ordered the parties to the case to negotiate long term management plans for the fishery. As a party to this negotiation process, and any court orders implementing the same, the Secretary will be bound by his results and the ocean fishery will thus be determined by this process. In essence, the ocean salmon regulations, required to be adopted as part of a public participation process under the FCMA, are instead being determined by this negotiation process and the continuing jurisdiction of the court. The Association is thus totally frozen out of the regulatory process in spite of the fact

possibilities that the Association's case will not be decided prior to the 1983 season or that it may lose its case on the merits.[4]

As further support for the alleged non-importance of this case, the United States incorrectly suggests that a recent decision by the district court has somehow eliminated the results feared by the Association such that it is no longer important for the Association to intervene. This is again an extremely misleading statement. The recent ruling by the district court only held that multiple runs of a given species to

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that the FCMA requires that user groups such as the Association be included in development of the regulations and have a right to court review of the same.

[4]The Association's Motion for Expedited Hearing was denied by the Ninth Circuit and it is not at all clear when this case will be heard or decided. Thus, the Association's participation in the negotiation process regarding the management of the 1983 coastal salmon fishery could be crucial even if its position were ultimately accepted in the Ninth Circuit appeal. Given the current economically depressed status of the ocean charterboat industry, it is entirely possible that the industry will essentially cease to exist if some relief is not obtained prior to the 1983 season.

a given river may be counted together when determining whether the tribes have received their 50% share of the resource. This means, for example, that if there were more than one coho salmon run to the Hoh River, all such coho runs could be counted together to determine whether the tribes received 50% of the Hoh coho. In most cases, this does absolutely nothing to eliminate the basic inequity the Association seeks to have overturned.[5] Thus, the recent court ruling has done little, if anything, to resolve the basic inequity caused by recent management which has resulted in large transfers of harvest to

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[5]In most cases, the problem is caused not by multiple runs of a single species to a single river, but rather by multiple runs of different species to a single river. For example, the coho run or runs on a given river may be extremely weak, whereas the runs of other species on that river, or coho runs from other streams, may be very strong. Even under the district court's recent ruling, the ocean harvest of the other, stronger runs of fish from that and other rivers would be severely limited so as to return precisely 50% of the harvestable numbers of the weak coho run or runs to the single river involved. No aggregation of species or river systems is allowed to reduce the need to limit harvest of stronger runs while ensuring the tribes maintain 50% of the overall harvest.

the Canadian fisheries and an overall treaty Indian harvest of substantially in excess of 50% of the coastal runs.

Finally, in spite of the fact the United States admits at page 8 of its brief that there is no res judicata effect to the prior decisions with respect to the issues the Association seeks to have determined, its position suggests that non-Indian ocean fishermen, whose very livelihood is at stake, are not sufficiently important to justify this Court's review of decisions denying them participation in court proceedings determining such issues. Such a position by the United States is entirely inconsistent with the Secretary's obligations under the FCMA which requires the Secretary to regulate in a manner consistent with maintaining a healthy recreational fishery in waters regulated under the Act and prcvides for participation of user groups in the regulatory process and judicial review thereof.

Obviously the United States considers it more important to maintain its position on the merits than to provide U.S. fishermen meaningful participation in the processes controlling the ocean fishery off the coast of Washington.

II.

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT TRIBES

In their brief, the respondent tribes attempt to misconstrue the issue presented for this Court's review in order to lead the Court to a conclusion that the Association is merely attempting to relitigate, under a different name, the issues conclusively decided in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Almost incidentally, the tribes discuss the issue of whether the Association was entitled to be an intervenor under Rule 24(a) of the Federal Rules of Civil Procedure. This response by the tribes represents another chapter in their long struggle to prevent any non-Indian fishermen

from having an opportunity for court review of the substantial issues involved with respect to the relationship between the FCMA and the Indian treaty rights as interpreted by the courts of the United States.[6]

A. The Tribes' Arguments Regarding Res Judicata Are Both Incorrect and Improperly Considered With Respect To A Petition For Intervention.

As set forth in the Association's opening brief, it is improper for a court to consider the merits of a controversy, or matters of defense, in determining a party's right to intervene under Rule 24(a). In spite of this fact, the tribes continually raise their argument regarding a res judicata effect of previous decisions on the issues attempted to be litigated by the Association.

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[6]This opposition is understandable in light of the fact that the current regulatory format adopted by the district court in the case below, and by the Secretary in his regulation of the ocean fishery, ensures the tribes a harvest of much more than 50% of the overall harvestable numbers of fish emanating from the coastal streams which are subject to their treaty right.

In its opening brief, the Association has set forth the reasons why the prior decisions cited by the tribes have not answered the questions which the Association seeks to have reviewed. Even the United States admits in its brief that these prior decisions did not answer the question as to the proper allocation format to apply to the mixed stock ocean fishery in order to meet the requirements of both the Indian treaty rights and the FCMA.

The tribes also attempt to assert the defense of parens patriae. As explained above, the reliance on such a doctrine in this case which deals with rights of U.S. citizens to fish in federally regulated waters is totally misplaced. The State simply cannot represent the Association's interests in such a case.

B. The Petition For Intervention Of The Association Was Perfected In A Timely Fashion.

The respondent tribes next suggest that the Court need not grant this

petition for review because the Association, by filing an answer in intervention approximately two weeks after its motion, did not fully comply with Rule 24(c) in a timely fashion. In this regard, it is important to note that neither the district court nor the court of appeals relied on the tribes' previous presentation of this issue in reaching their decision regarding intervention. Since the courts below did not accept this argument, or base their decision thereon, the question of compliance with Rule 24(c) is not properly before the Court. However, the tribes' claims with regard to the supposed non-compliance with Rule 24(c) are clearly without substance.

The tribes' complaint regarding Rule 24(c) is merely an attempt to put form over substance and apply a technical double standard to the Association purely for purposes of defeating rightful intervention. The purpose of the pleading requirement of Rule 24(c) is to allow all parties to understand the position, claims and nature of relief

sought by the prospective intervenors. The prevalent view with respect to the requirements of Rule 24(c) is that non-prejudicial technical defects in compliance should be disregarded. Spring Construction Company v. Harris, 614 F.2d 374, 376-77 (4th Cir. 1980); Shores v. Hendy Realization Company, 133 F.2d 738, 742 (9th Cir. 1943); 7A Wright & Miller, Federal Practice & Procedure §1914 and cases cited in note 84 thereto.

A review of the Association's motion, and its accompanying affidavits, clearly demonstrates the intent of Rule 24(c) was met by this pleading alone and that it, in essence, constituted a pleading setting forth the claim or defense on which intervention is sought.[7] Furthermore, given the

[7]The motion to intervene was more detailed and provided more knowledge of the position, claims and nature of relief sought by the Association than is typical in a pleading filed pursuant to the notice pleading provisions of the federal rules. It was four pages with ten paragraphs detailing the Association's claims to the extent they could be known at that stage. In addition, there was a five page affidavit providing the factual basis for such claims.

expedited nature of the case, it would have been appropriate for the Association to delay any pleadings in intervention until it had been able to more fully determine the positions of the various parties.[8] It would be totally incongruous to hold that the Association's attempt to provide all parties the earliest possible notice of its intent to intervene, through the filing of a motion prior to the answer of the primary defendant, should somehow cause intervention to be denied. This is especially true in light of the fact that, as set forth in affidavits in the case, the Association was informed by Judge Craig's clerk that it need not file an answer to the plaintiffs' complaint until such time as the defendant's answer was due under the expedited schedule.

Not only has this alleged

[8]Since the expedited schedule adopted by the trial court did not provide for an answer to be filed by the United States until July 25, 1981, and since the Association intended to take a position contrary to the United States as well, the Association could not have been expected to file pleadings setting forth its claims and defenses until after the case was at issue.

defect been of no prejudice to the tribes herein, but the respondent tribes should not be allowed to complain of any alleged failure to comply with Rule 24(c) in light of other, very numerous failures of various parties to comply with technical court rules in this action and about which they did not complain.[9] Furthermore, it must be realized that any technical defense regarding the simultaneous filing of the Association's motion and supporting pleadings was made necessary by the tribes' own request for extreme expedition.

C. Whether The Case Below Is A Published Opinion Should Not Affect The Application Of This Court's Supervisory Power.

The respondent tribes suggest

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[9]The United States has never filed an answer to the tribes' complaint. The State was allowed to intervene on the day of the trial, even though it never filed a pleading pursuant to Rule 24(c), much less file it simultaneously with its motion to intervene. A review of the clerk's record will show many other violations of technical court rules regarding timing in other matters. Because these violations served the best interests of the tribes (for example, to gain jurisdiction over the State to allow their requested remedy), they saw fit to ignore them.

that since the Ninth Circuit decision in this case was an unpublished memorandum opinion, it has no precedential value and therefore no potential for causing a conflict among the circuits. This is certainly not a reason for this Court to reject review of this case. Rule 17(a) of the Supreme Court Rules states that review is appropriate when a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter. It says nothing about a requirement that such conflicting decision be a published opinion with precedential value. It makes no difference to the party who is wronged by an incorrect decision whether or not that decision is published. In addition, the Supreme Court's supervisory powers discussed in Rule 17 certainly must go beyond the technical distinction between published and unpublished decisions if they are to protect the rights of citizens of the United States to access to its courts.

III. CONCLUSION

Neither the Secretary nor the respondent tribes have even attempted to suggest that this is not a case which is of the utmost importance to the economic and social interests of the Association. At best they present very weak, technical arguments as to ways to rationalize the lower courts' decision. In light of the severe impacts the decision in the case below has had on the Association, and the impacts the court's continuing jurisdiction will continue to have, denial of intervention to the Association in this case constitutes an affront to traditional concepts of due process and fairness which this Court must correct if the constitutional and statutory right of access to our courts is to have any meaning.

Respectfully submitted,

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